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THE FUTURE OF STATE BLAINE AMENDMENTS IN
LIGHT OF *TRINITY LUTHERAN*:
STRENGTHENING THE
NONDISCRIMINATION ARGUMENT

*Margo A. Borders**

INTRODUCTION

The conversation surrounding religious freedom has reached a point of particularly heightened tension in this country. Issues of religious freedom continue to surround controversies such as healthcare coverage, discrimination based on sexual identity, and general government involvement in religious affairs. Of particular importance in the recent past has been the issue of government funding for religious entities. The Court has grappled with this question in different contexts for decades, asking: In what cases might government funding come too close to impermissibly establishing religion, or in what cases might the absence of the funding discriminate against religious practice?

Some past conversation on the topic, particularly for school choice advocates, has centered on the controversial state constitutional amendments that often block all government funding for religious organizations.¹ Referred to as the “State Blaines,” or “Baby Blaines,” these amendments were inspired by the federal Blaine Amendment, proposed and failed in 1875, that would have restricted state governments from allocating any funding to religious entities.² Opponents of the State Blaine Amendments (“State Blaines”) have questioned the constitutionality of applying the no-funding provisions in ways that are discriminatory to religious organizations. The Court’s recent holding in *Trinity Lutheran Church of Columbia, Inc. v. Comer*³ presents an example of a challenged state policy based on a strict state no-funding provi-

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1 See *infra* Part I.

2 *Id.*

3 137 S. Ct. 2012 (2017).

sion, and the Court's upholding of a church's right to participate in a neutral government funding program while continuing to freely practice its religion.⁴

In particular, the Court's strong affirmation of nondiscrimination principles of the First Amendment in *Trinity Lutheran* could signal the Court's willingness to hear more challenges to State Blaines and to be receptive to the idea that these strict no-funding provisions could facially contradict the First Amendment's mandate to protect religious practice.⁵ Therefore, this Note will examine the interaction between, and possible consequences stemming from, the *Trinity Lutheran* opinion and the State Blaines. In particular, this Note will examine whether this new jurisprudence regarding the constitutionality of allowing or prohibiting public state funding for religious organizations could provide new grounds for school choice advocates to attack the constitutionality of State Blaines.

In Part I, this Note will examine a brief history of the proposed federal Blaine Amendment, and the subsequent adoption of many State Blaines across the nation. Next, in Part II, the Note will discuss why the State Blaines are frequently debated, specifically in the context of the issue of school choice. The Note will then examine two of the main arguments against the constitutionality of State Blaines—the animus arguments and the First Amendment arguments—and will examine the strengths and weaknesses of each argument. In Part III, the Note will discuss the culmination of recent caselaw in the *Trinity Lutheran* opinion. Finally, in Part IV, this Note will contemplate the effect that this recent court opinion could have on attacking the constitutionality of State Blaines, particularly for advocates of school choice. This Note will ultimately argue that while the majority opinion in *Trinity Lutheran* does not explicitly mention State Blaines, the Free Exercise Clause jurisprudence affirmed by the opinion could strengthen the likelihood of future successful challenges to the State Blaines on constitutional grounds using a nondiscrimination argument, and will make success more likely with this argument than with an animus argument.

I. A BRIEF HISTORY OF “BLAINES”

In the mid to late nineteenth century, during the rise of the so-called “common schools,”⁶ the issue of religion in schools came to the forefront of American politics. In Massachusetts, Horace Mann, the nation's first State Secretary of Education and the “father of American public education,”⁷ advocated for a public education system that was unaffiliated with any particular

4 See *infra* Part III.

5 See *infra* Part IV.

6 For a general overview of the development of public education in America, see Peter H. Hanna, Note, *School Vouchers, State Constitutions, and Free Speech*, 25 CARDOZO L. REV. 2371, 2382–84 (2004).

7 JOSEPH E. BRYSON & SAMUEL H. HOUSTON, JR., *THE SUPREME COURT AND PUBLIC FUNDS FOR RELIGIOUS SCHOOLS, THE BURGER YEARS, 1969–1986*, at 16 (1990).

religion.⁸ However, this does not mean that religion was absent from American daily life or education.⁹ Indeed, after the creation of American public schools, teachings of Protestantism were prevalent in the education system,¹⁰ as were fears about the rise of Catholic influence. As the Catholic population was growing,¹¹ particularly in cities like New York, Chicago, Philadelphia, Boston, Cincinnati, Baltimore, San Francisco, and St. Paul,¹² Protestants began to resist the “Catholic menace,”¹³ specifically through campaigns to deny public funding for Catholic or any “sectarian” institutions.¹⁴ Political tensions between Protestants and Catholics gave rise to the proposal of a constitutional amendment in 1875 that has since had lasting impacts on the modern discussion of school funding and religious freedom in the United States.

A. *The Federal Blaine Amendment*

The proposed amendment to the Constitution was a response to the school funding controversy between Protestants and Catholics.¹⁵ In September of 1875, President Ulysses S. Grant advocated a constitutional amend-

8 Hanna, *supra* note 6, at 2383.

9 See Joseph P. Viteritti, *Blaine’s Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 HARV. J.L. & PUB. POL’Y 657, 662 (1998) (noting that “[t]he religious congregation was at the heart of the American notion of community”).

10 See *id.* at 666 (“The common-school curriculum promoted a religious orthodoxy of its own that was centered on the teachings of mainstream Protestantism . . .”). For example, under Horace Mann’s leadership, Massachusetts public schools mandated daily readings from the Bible. *Id.* at 666–67; see also Steven K. Green, *The Blaine Amendment Reconsidered*, 36 AM. J. LEGAL HIST. 38, 45 (1992) (“Schools were the primary promulgators of [the] Protestant way of life.”); Ward M. McAfee, *The Historical Context of the Failed Federal Blaine Amendment of 1876*, 2 FIRST AMEND. L. REV. 1, 3 (2004) (“Most Protestant Americans in the 1870s firmly believed in religious instruction in public education.”). In fact, the New York Public School Society proclaimed that forced reading of the King James Bible in public schools did not constitute a “sectarian education.” Hanna, *supra* note 6, at 2386.

11 See Kyle Duncan, *Secularism’s Laws: State Blaine Amendments and Religious Persecution*, 72 FORDHAM L. REV. 493, 504 (2003) (noting that the Catholic population in America had grown from 10% in 1866 to 12.9% by 1891); see also Jay S. Bybee & David W. Newton, *Of Orphans and Vouchers: Nevada’s “Little Blaine Amendment” and the Future of Religious Participation in Public Programs*, 2 NEV. L.J. 551, 555 (2002) (noting that fewer than 1% of Americans were Catholics at the time of the founding, but that figure grew to more than 10% by the end of the Civil War).

12 Viteritti, *supra* note 9, at 669.

13 The tension between the Protestants and Catholics has been explained to be rooted in “the Americans’ inability to reconcile the newly established concepts of liberty and independence with the ‘authoritarian organization of the Catholic Church.’” Brandi Richardson, Comment, *Eradicating Blaine’s Legacy of Hate: Removing the Barrier to State Funding of Religious Education*, 52 CATH. U. L. REV. 1041, 1049, 1051 (2003) (quoting LLOYD P. JORGENSEN, *THE STATE AND THE NON-PUBLIC SCHOOL: 1825–1925*, at 29 (1987)).

14 Viteritti, *supra* note 9, at 670; see also Green, *supra* note 10, at 43. These legislative actions were provoked by Catholic requests for public funds for their own schools. Duncan, *supra* note 11, at 505–07.

15 See Green, *supra* note 10, at 47–57.

ment to keep public funding from private schools in order to gain support from the Protestants and to definitively end the debate about religion in schools.¹⁶ The speech garnered wide support across the Republican Party,¹⁷ prompting Representative James Blaine of Maine, who was seeking the Republican presidential nomination in the next election, to sponsor Grant's amendment in the House of Representatives.¹⁸ On December 14, 1875,¹⁹ Blaine submitted a proposal that read:

No State shall make any law respecting an establishment of religion or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefore, nor any public lands devoted thereto, shall ever be under the control of any religious sect, nor shall any money so raised or lands so devoted be divided between religious sects or denominations.²⁰

The amendment, which would have been the Sixteenth Amendment to the U.S. Constitution, would have applied the Establishment Clause of the First Amendment²¹ to the states, and more importantly, would have prohibited state governments from allocating public funding to religious organizations.²² Many scholars have written about the motivations behind the proposal of the federal Blaine Amendment, and have concluded that, although Blaine was motivated by his own political ambitions in proposing the amendment, its near success in Congress can be attributed to longstanding anti-Catholic bias.²³ The anti-Catholic animus that guided the amend-

16 *Id.* at 47–49 (noting that President Grant's speech "clearly aligned the Republican Party with the Protestant cause," and that in making the speech, he "sought to realign the party in favor of [free] education").

17 *See id.* at 48 ("The Protestant *Christian Advocate* wrote that the speech was 'full of wisdom' and called for a constitutional amendment to put the suggestions into practice." (quoting *Something Significant*, 50 *CHRISTIAN ADVOC.*, 313, 316 (1875))). Green also notes that the only protests to Grant's speech were from Catholics. *See id.*

18 *Id.* at 49–50; *see also* Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 *HARV. J.L. & PUB. POL'Y* 551, 557 (2003); Viteritti, *supra* note 9, at 670.

19 Duncan, *supra* note 11, at 509.

20 DeForrest, *supra* note 18, at 556 (quoting H.R.J. Res. 1, 44th Cong. (1875)).

21 U.S. CONST. amend. I.

22 *See* DeForrest, *supra* note 18, at 557. Viteritti notes that a prohibition on use of federal funds for religious education was unsupported by any legal precedent at the time, so Blaine's constitutional argument for his amendment was weak. *See* Viteritti, *supra* note 9, at 671 (explaining that Blaine claimed to be correcting a "constitutional defect" (quoting F. William O'Brien, *The States and "No Establishment": Proposed Amendments to the Constitution Since 1798*, 4 *WASHBURN L.J.* 183, 188 (1965))).

23 *See* Richard W. Garnett, *The Theology of the Blaine Amendments*, 2 *FIRST AMEND. L. REV.* 45, 62 (2004) ("[The State Blaine Amendments] cannot be fully understood without reference to the irreducibly anti-Catholic ideology that inspired and sustained them."); McAfee, *supra* note 10, at 4 (noting that most supporters of the Blaine Amendment saw the proposal as "aimed solely at thwarting the threat of the Roman Catholic 'sect' to the American public school"); Viteritti, *supra* note 9, at 659 ("[T]he Blaine Amendment is a remnant of nineteenth-century religious bigotry promulgated by nativist political leaders who were

ment will further the discussion about potential challenges to the State Blaine Amendments in Part II.

Although the amendment gained much support in Congress and passed the House, it ultimately failed in the Senate by only four votes.²⁴ The life of the proposed amendment was not finished, however, as its effects are still being felt on the state level today.²⁵

B. *State Constitutions and “Baby Blaines”*

The Blaine Amendment failed to pass at the federal level, but it created a strong movement within the Republican Party²⁶ that would greatly affect the conversation about church and state separation, specifically the “national debate over aid to religious schools.”²⁷ The momentum of the separationist movement was felt in the states, where state constitutional amendments restricting religious school funding were being passed rapidly.²⁸ While twelve states adopted similar provisions in the 1870s,²⁹ Congress also began requiring territories seeking admission to the Union to adopt these separationist provisions in their original constitutions.³⁰ By the 1890s, around thirty states would incorporate these types of constitutional amendments,³¹

alarmed by the growth of immigrant populations and who had a particular disdain for Catholics.”); Richardson, *supra* note 13, at 1053 (“Many sources, including proponents of the legislation, recognized the legislative efforts of the time as waging ‘a general war against the Catholic Church.’” (quoting Viteritti, *supra* note 9, at 672)).

24 Duncan, *supra* note 11, at 510. For a comprehensive look at the life of the proposed Blaine Amendment in both houses of Congress, see Green, *supra* note 10, at 57–68. The arguments in Congress supported the specifically anti-Catholic ideas behind the amendment, as senators made statements directly referencing and attacking the Church. See DeForrest, *supra* note 18, at 570.

25 Viteritti, *supra* note 9, at 674 (“Today, the legal restrictions imposed by States to curtail aid to religious schools and their students remain quite powerful.”).

26 *Id.* at 672 (explaining that the separationist principles of the Blaine Amendment were “incorporated into the Republican national party platform”); see also Duncan, *supra* note 11, at 512.

27 Viteritti, *supra* note 9, at 672.

28 Duncan, *supra* note 11, at 513 (describing the “proliferation” of these state amendments in the late nineteenth century).

29 *Id.* (reporting these twelve states as Illinois, Pennsylvania, Missouri, Alabama, Nebraska, Colorado, Texas, Georgia, New Hampshire, Minnesota, California, and Louisiana). Although most states adopting Blaine Amendments did so after the funding issue was presented in Congress, there are a few exceptions. For example, New York adopted a restrictive funding law in the 1840s, well before funding became a federal issue. *Id.*

30 See Viteritti, *supra* note 9, at 673. An example of congressional legislation that mandated this process is the Enabling Act of 1889, ch. 180, 25 Stat. 676, which forced new states like Montana, North Dakota, South Dakota, and Washington to adopt this provision in order to be admitted into the Union. Viteritti, *supra* note 9, at 673. The wording of the Enabling Act is almost identical to the proposed federal Blaine Amendment, and it has been argued that the words were “intended to reinforce the generic Protestantism of the common schools.” DeForrest, *supra* note 18, at 574.

31 See DeForrest, *supra* note 18, at 573.

and today, thirty-seven states have adopted some version of the Blaine Amendment into their constitutions,³² which are also referred to as “Baby Blaines.”³³

State Blaines are quite diverse and vary widely by state,³⁴ so it is difficult to generalize about their substance.³⁵ Many of the amendments prohibit state funding of religious schools altogether, some only prohibit nondiscriminatory funding of religious schools, and some have not been interpreted at all.³⁶ Frank Kemerer has categorized states into restrictive, permissive, and uncertain in terms of restricting aid to sectarian schools.³⁷ Within the restrictive category, several states prohibit both direct and indirect aid to sectarian schools, while some have more general restrictions on aid.³⁸ Mark DeForrest categorizes states with Blaine provisions in a different way—he puts the states on a continuum, on which one side are State Blaines that narrowly restrict state funding to private education,³⁹ and on the other side are states with broadly interpreted provisions that more widely allow funding to private, or sectarian education.⁴⁰ In the middle are states with some moderate provisions that “permit some form of government aid to religious schools but prohibit overt funding.”⁴¹

Some State Blaines target just education, while other, more extensive State Blaines prohibit *any* governmental aid that would support any sectarian institution.⁴² For example, the Missouri Constitution has both a specific pro-

32 See *Blaine Amendments*, INST. FOR JUSTICE, <http://ij.org/issues/school-choice/blaine-amendments/> (last visited Mar. 5, 2018).

33 David Wilhelmsen, Note, *Orphans, Baby Blaines, and the Brave New World of State Funded Education: Why Nevada’s New Voucher Program Should Be Upheld Under Both State and Federal Law*, 42 J. LEGIS. 257, 258 (2016).

34 DeForrest, *supra* note 18, at 576.

35 Because the amendments vary greatly, this Note will not examine the substance of each state constitutional provision in depth. Instead, this Note will speak about State Blaine Amendments as generally prohibiting state funding from religious schools in some way and will examine the potential challenges to this type of state amendment.

36 See Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155, 188 (2004).

37 Viteritti, *supra* note 9, at 674–75 (citing Frank R. Kemerer, *State Constitutions and School Vouchers*, 120 EDUC. L. REP. 1, 37 (1997)).

38 *Id.* at 675 (citing Kemerer, *supra* note 37, at 5–7). On the other hand, some states do proscribe the use of “vouchers or tax benefits” for students attending private schools, once again highlighting the wide variety in the constitutional provisions among the states. *Id.*

39 While some provisions, like Michigan’s, prohibit state funding for *all* private schools, most prohibit state funding specifically to sectarian, or religious, schools. DeForrest, *supra* note 18, at 588–89.

40 *Id.* at 577. States with less restrictive Blaine provisions include New Jersey and Massachusetts, while states with the most broad and restrictive Blaine provisions include Florida and Missouri. *Id.* at 577, 587.

41 *Id.* at 577.

42 *Id.* at 587–88 (identifying examples of states with extremely broad funding provisions, such as Missouri, Oklahoma, Indiana, Georgia, Colorado, and others); see also Bybee & Newton, *supra* note 11, at 559 (giving examples of California’s constitution, which pro-

vision prohibiting government funding to “help to support or sustain any private or public school, academy, seminary, college, university, or other institution of learning controlled by any religious creed, church or sectarian denomination,”⁴³ and a more general prohibition on government funding for any religious institution.⁴⁴ While the differences between the State Blaines are vast, they all share a common feature— “[t]he plain object of disabling religion”⁴⁵ Most importantly, the ways in which the State Blaines have been interpreted and applied by their respective state courts determines whether they arguably violate the U.S. Constitution.⁴⁶ In Part II, this Note will examine the different approaches both state and federal courts have taken in response to challenges to State Blaines, and will further argue that the First Amendment challenges will be strengthened with the modern Court’s developing jurisprudence, evidenced by *Trinity Lutheran*.

II. CHALLENGING THE BLAINES

A. *Public Funding for Religious Education and the Argument for School Choice*

After examining the origin of the Blaine Amendment and its long-lasting effect on states today, the questions remain: Why are the Blaine Amendments of such concern? Why have so many scholars evaluated challenges to the amendments, and why is the future of the Blaine Amendments of any import? The answers lie at the intersection of religious freedom and education in the country today—school choice.

The term “school choice” generally refers to any policy that gives parents the choice of different educational options, such as “public school transfer

vides a funding restriction specifically aimed at education, and the Illinois Constitution, which prohibits funding for any organization with a sectarian purpose). For another look at specific states’ provisions, such as Vermont, Wisconsin, Arizona, and Missouri, see Aaron E. Schwartz, Comment, *Dusting off the Blaine Amendment: Two Challenges to Missouri’s Anti-Establishment Tradition*, 73 MO. L. REV. 129, 149–55 (2008).

43 DeForrest, *supra* note 18, at 587 (quoting MO. CONST. art. IX, § 8).

44

That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship.

MO. CONST. art. I, § 7. This provision was at issue in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, and will be discussed in Part III *infra*. 137 S. Ct. 2012 (2017).

45 Duncan, *supra* note 11, at 516.

46 See *id.* at 524 (arguing that many state courts have interpreted the State Blaines as going “beyond the federal Establishment Clause,” and thus are unconstitutional interpretations); see also Viteritti, *supra* note 9, at 680–81 (explaining that state courts, through their own constitutions, have defined rights more broadly than the Supreme Court has with the Federal Constitution, but the problem arises when the state courts’ interpretations “abridge federally defined rights”).

options, charter and magnet schools, home schooling, scholarships, vouchers, and tax credits or deductions.”⁴⁷ School choice programs give funds, often called “vouchers,” that would have been spent by the state on a student in a public school to students, often low-income students,⁴⁸ for use at a private school.⁴⁹ Alternatively, the programs could give tax credits, which come either as tax-credit-funded scholarship programs, personal tax credits and deductions, or refundable tax credit programs.⁵⁰ School choice opponents argue that when states give money to religious schools directly or indirectly through school choice programs, the government effectively funds religious education, which is prohibited by most State Blaines.⁵¹ Therefore, if school choice proponents could successfully challenge State Blaines, they could eliminate a huge roadblock on the path to school choice programs.⁵² State Blaines have therefore often been challenged in the context of school choice issues.

On the federal level, school choice was deemed constitutional in 2002 by the Supreme Court in *Zelman v. Simmons-Harris*, where the Court examined a federal constitutional challenge by state taxpayers to the Ohio Pilot Scholar-

47 RICHARD D. KOMER & OLIVIA GRADY, INST. FOR JUSTICE & AM. LEGISLATIVE EXCH. COUNCIL, *SCHOOL CHOICE AND STATE CONSTITUTIONS: A GUIDE TO DESIGNING SCHOOL CHOICE PROGRAMS* 9 (2d ed. 2016).

48 See, e.g., Joseph P. Viteritti, *School Choice: The Threshold Question*, 75 ST. JOHN’S L. REV. 251, 253 (2001) (describing some of the first voucher plans in the country in Milwaukee and Cleveland as being need-based voucher programs).

49 Cf. KOMER & GRADY, *supra* note 47, at 9.

50 *Id.* Refundable tax credit programs give eligible parents “tax credits for educational expenses up to the limit of tax they owe and then a ‘refund’ from the government for any remaining educational expenses that are below a set ceiling on such expenses.” *Id.* at 9–10. In general, tax credit programs, which involve privately funded scholarships, have not been challenged as often or successfully as the voucher programs because the funding is private. *Id.* at 7–8; see also Hanna, *supra* note 6, at 2395 (describing tax credits as more like “income tax breaks granted by the government” rather than “government-endorsed checks”).

51 The question of school choice is often intertwined with issues of religious freedom because the majority of private schools in America are religious. *Statistics About Nonpublic Education in the United States*, OFFICE OF NON-PUB. EDUC. (Dec. 2, 2016), <https://www2.ed.gov/about/offices/list/oii/nonpublic/statistics.html> (noting that as of 2013–2014, almost seventy percent of private schools were religious).

52 This Note will not argue for or against school choice. Instead, it will examine different arguments for and against State Blaine Amendments, which could have important effects for school choice programs. For more extensive analyses of school choice, see generally Nicole Stelle Garnett & Richard W. Garnett, *School Choice, the First Amendment, and Social Justice*, 4 TEX. REV. L. & POL. 301 (2000). For a discussion about the “legality and morality of educational choice,” see *id.* at 309. See also JOSEPH P. VITERITTI, *CHOOSING EQUALITY: SCHOOL CHOICE, THE CONSTITUTION, AND CIVIL SOCIETY* (1999) (arguing how and why school choice can advance equality through charter schools and vouchers for the poor); Viteritti, *supra* note 48, at 259 (arguing for the implementation of school choice and describing it as a “moral question”). But see Steven K. Green, *The Legal Argument Against Private School Choice*, 62 U. CIN. L. REV. 37, 39 (1993) (discussing the policy arguments and legal theories that go against school choice).

ship Program.⁵³ The taxpayers argued that the program violated the Establishment Clause because, by funding students who went to religious schools, the program had the effect of “advancing or inhibiting religion.”⁵⁴ The Court found that school choice programs are constitutional as long as they are made available “without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited,” as well as that “[a]ny aid . . . that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients.”⁵⁵ In sum, the Court found that school choice programs, if neutral and focused on the freedom of the parent to choose the school of their choice, do not violate the Establishment Clause.⁵⁶ While the Establishment Clause invalidates government action that directly funds religion, like directly paying the religious organization, school choice programs give a family the choice to use the money at whatever type of educational institution they desire.⁵⁷

After the Supreme Court ruled that school choice programs do not violate the Establishment Clause of the U.S. Constitution, eliminating the argument against school choice on the federal level,⁵⁸ opponents have challenged school choice programs that include religious schools on the state level by relying on State Blaines,⁵⁹ which are more specific on their face about restricting funding for religious organizations.⁶⁰

Several years after *Zelman*, the Supreme Court in *Locke v. Davey* considered the constitutionality of disallowing a student pursuing a degree in devotional theology from using a state scholarship.⁶¹ The student was excluded

53 *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

54 *Id.* at 648–49 (quoting *Agostini v. Felton*, 521 U.S. 203, 222–23 (1997)).

55 *Id.* at 650–51 (quoting *Witters v. Wash. Dep’t of Servs. for the Blind*, 474 U.S. 481, 487 (1986)); see also KOMER & GRADY, *supra* note 47, at 10 (describing the essential characteristics of a school voucher program as “religious neutrality” and “true private choice”); Robert A. Dietzel, Comment, *The Future of School Vouchers: A Reflection on Zelman v. Simmons-Harris and an Examination of the Blaine Amendments as a Viable Challenge to Sectarian School Aid Programs*, 2003 MICH. ST. DCL L. REV. 791, 793–94 (describing these requirements as “very general and easily met”).

56 *Zelman*, 536 U.S. at 652–53; see Dietzel, *supra* note 55, at 794 (explaining that the Establishment Clause is not violated by these aid plans because they “are not designed or administered with the intent of aiding or endorsing religion,” but instead provide the opportunity “to choose an alternative to the traditional public school”). However, the Court did rule decades earlier that direct aid to parochial schools in the form of salary supplements to teachers constituted excessive entanglement of church and state, and thus violated the Religion Clauses of the First Amendment. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

57 Steven G. Calabresi & Abe Salander, *Religion and the Equal Protection Clause: Why the Constitution Requires School Vouchers*, 65 FLA. L. REV. 909, 1032 (2013).

58 See, e.g., Richardson, *supra* note 13, at 1063–64.

59 See KOMER & GRADY, *supra* note 47, at 10 (“[O]pponents were left with state constitutions as their only avenue for attacking school choice programs.”).

60 See Dietzel, *supra* note 55, at 794 (“[P]rovisions of most state constitutions are more specific in their proscription of state supported religious schools.”).

61 *Locke v. Davey*, 540 U.S. 712 (2004).

from doing this under a Washington constitutional provision that prohibited the state scholarship money from supporting a religious education.⁶² However, the student would have been able to attend the religious school and keep the scholarship if he studied religion from a secular perspective.⁶³ The Court ruled that because “[t]he State has merely chosen not to fund a distinct category of instruction” instead of making students “choose between their religious beliefs and receiving a government benefit,” the state’s action did not violate the First Amendment.⁶⁴ The Court effectively established that while school choice programs themselves do not violate the U.S. Constitution, states could rely on their own constitutional provisions to limit the options in a school choice program.⁶⁵ The holding in *Davey* affords some latitude to opponents of school choice to rely on State Blaines to potentially take away religious options from school choice programs.⁶⁶

The states’ potential ability to use State Blaines in this way makes it critical to examine the ways in which state courts have interpreted State Blaines, and ultimately, to examine if federal courts have found or could potentially interpret these state provisions to be more constricting on religious freedom than the Constitution allows.

B. *The Animus Argument*

Before examining other possible First Amendment arguments against Blaine Amendments, this Note will examine a common argument made using the background and motives of the State Blaines.⁶⁷ Those who oppose State Blaine Amendments often cite the Amendments’ basis in religious animosity towards Catholicism, starting with the proposal of the federal Blaine Amendment.⁶⁸ This argument is grounded in the idea that the otherwise facially neutral amendments were motivated solely by a hatred of Catholicism,⁶⁹ and so are constitutionally invalid under either the Equal Protection

62 *Id.* at 717–18.

63 *Id.* at 716–17.

64 *Id.* at 720–21.

65 See KOMER & GRADY, *supra* note 47, at 7.

66 *Id.* Some have argued that the holding in *Davey* is narrow, applying only to the training of clergy, and because Blaine Amendments are broader restrictions on government funding for any religious organization, the possibility of holding the Blaine Amendments unconstitutional is still open. Calabresi & Salander, *supra* note 57, at 1041. The Court in *Trinity Lutheran* advances this opinion by arguably narrowing *Davey*’s holding. See *infra* Section III.B.

67 See Marc D. Stern, *Blaine Amendments, Anti-Catholicism, and Catholic Dogma*, 2 FIRST AMEND. L. REV 153, 158 (2004) (claiming that in the debate over State Blaines, most of the attention has been on animus arguments).

68 For a discussion of the anti-Catholic motives for the Blaine Amendment, see sources cited *supra* note 23.

69 This is a frequently debated assertion, and it is often difficult to articulate a legislator’s exact motivation in passing a specific law. However, at least *some* anti-Catholic motivation is clear from the history of the proposal for the federal Blaine Amendment. See Stern, *supra* note 67, at 166–67 (“It would be fruitless to deny that the Blaine Amendments taken

Clause of the Fourteenth Amendment,⁷⁰ or the Establishment and Free Exercise Clauses of the First Amendment.⁷¹

The argument for unconstitutional animus under the Equal Protection Clause is based on the general agreement that federal caselaw presumptively makes unconstitutional any laws that are motivated by a prejudice against a certain class.⁷² *Romer v. Evans* illustrates this general principle, as the Court held, in an opinion authored by Justice Kennedy, that a provision of the Colorado Constitution prohibiting state legislation protecting discrimination on the basis of sexuality violated the Equal Protection Clause.⁷³ The Court in *Romer* put special emphasis on the rationale of legislators in passing the legislation, and so an Equal Protection analysis would focus on the intent behind the law.⁷⁴ In addition to proving impermissible motive, the plaintiff must prove the absence of any legitimate governmental interest served by the law in order to succeed on the claim.⁷⁵

Scholars also argue that government action based on specifically religious animus could be challenged under the Establishment and Free Exercise Clauses. Challenges to State Blaines using the First Amendment will be examined further in Section II.C, but here, an argument based solely on religious animus using the Religion Clauses of the First Amendment is examined. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah* illustrates the idea that laws “that are designed to exclude disfavored faiths” are unconstitutional under the Religion Clauses.⁷⁶ The Court in *Lukumi* struck down a law based on animosity toward a certain religion.⁷⁷ The Court expressed that “a law targeting religious beliefs . . . is never permissible,” and that “if the object of a law is to infringe upon or restrict practices because of their relig-

as group were aimed at rebuffing Catholic efforts to obtain funding for their schools.”); Richardson, *supra* note 13, at 1075 (“It would be impossible to argue that the intent of the Blaine amendments was not to ‘harm a politically unpopular group.’” (quoting *Romer v. Evans*, 517 U.S. 620, 634 (1996))). *But see* Steven K. Green, *The Insignificance of the Blaine Amendment*, 2008 BYU L. REV. 295 (arguing that the possible motivations of the federal Blaine Amendment cannot clearly be tied to the passing of similar state provisions).

70 See Richardson, *supra* note 13, at 1075–76 (citing *Romer*, 517 U.S. at 635).

71 See Richard W. Garnett & Jackson C. Blais, *Religious Freedom and Recycled Tires: The Meaning and Implications of Trinity Lutheran*, 2016–2017 CATO SUP. CT. REV. 105, 109 (first citing *United States v. Windsor*, 570 U.S. 744 (2013); then citing *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993)).

72 See Stern, *supra* note 67, at 166–67 (first citing *Larson v. Valente*, 456 U.S. 228 (1982); and then citing *Hunter v. Underwood*, 471 U.S. 222 (1985)); *see also Romer*, 517 U.S. at 635 (holding that the purpose of a law cannot be to make a class of people unequal to everyone else).

73 *Romer*, 517 U.S. at 623–24.

74 Richardson, *supra* note 13, at 1072, 1075.

75 See Susannah W. Pollvogt, *Unconstitutional Animus*, 81 FORDHAM L. REV. 887, 896 (2012) (citing *Heller v. Doe*, 509 U.S. 312, 320 (1993)).

76 Brief of Constitutional Law Scholars as Amici Curiae in Support of Plaintiffs–Appellees and Affirmance at 12, *Int’l Refugee Assistance Project v. Trump*, 876 F.3d 116 (4th Cir. 2017) (No. 17-1351).

77 *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 542 (1993).

ious motivation, the law is not neutral . . . and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest.”⁷⁸ The Court establishes that in the Free Exercise context, “[f]acial neutrality is not determinative,” and therefore overt or covert targeting of “religious conduct for distinctive treatment” violates the Free Exercise Clause.⁷⁹ Scholars argue that the State Blaines could be attacked in federal court on the same constitutional basis, using either the Equal Protection Clause or the Religion Clauses of the First Amendment, because of the animosity towards Catholics that motivated their creation.⁸⁰

Several state courts have upheld challenges to school choice provisions against State Blaines,⁸¹ and Arizona in particular mentioned this animus argument in interpreting its State Blaine and ruling against a challenge to state funding for religious schools.⁸² While Arizona’s Supreme Court based its holding on the idea that the tax credit did not advance religion, and thus did not violate the Establishment Clause, the court notably wrote about the Blaine Amendment as “a clear manifestation of religious bigotry,” and that it would be difficult to “divorce the amendment’s language from the insidious discriminatory intent that prompted it.”⁸³ The state courts are not the only courts that have written about this aspect of the Blaine Amendment. In fact, the Supreme Court itself has recognized the discriminatory motives behind the original Blaine Amendment, and generally any “hostility to aid to pervasively sectarian schools,”⁸⁴ signaling a recognition that animus is a part of the conversation about the constitutionality of State Blaines.

78 *Id.* at 533 (citation omitted).

79 *Id.* at 534.

80 See Richard W. Garnett, *Brown’s Promise, Blaine’s Legacy*, 17 CONST. COMMENT. 651, 673 (2000). See generally Richardson, *supra* note 13.

81 Michael J. Dailey, Comment, *Blaine’s Bigotry: Preventing School Vouchers in Oklahoma . . . Temporarily*, 39 TULSA L. REV. 207, 226, 226 n.219 (2003) (noting specifically that Wisconsin, Ohio, Arizona, and Illinois have upheld school choice programs).

82 See Richardson, *supra* note 13, at 1060–62 (citing *Kotterman v. Killian*, 972 P.2d 606 (Ariz. 1999) (en banc)); see also Dailey, *supra* note 81, at 226–27.

83 Richardson, *supra* note 13, at 1062 (quoting *Kotterman*, 972 P.2d at 624).

84 *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (holding in a plurality opinion that a program that allowed federal funds to be given by the state to any school, including religiously affiliated private schools, did not violate the Establishment Clause).

Opposition to aid to “sectarian” schools acquired prominence in the 1870’s with Congress’ consideration . . . of the Blaine Amendment Consideration of the amendment arose at a time of pervasive hostility to the Catholic Church and to Catholics in general, and it was an open secret that “sectarian” was code for “Catholic.”

Id. Furthermore, the plurality of the Court proclaimed that the exclusion of “pervasively sectarian schools from otherwise permissible aid programs” is a doctrine “born of bigotry,” and “should be buried now.” *Id.* at 829; see also *Zelman v. Simmons-Harris*, 536 U.S. 639, 719–21 (2002) (Breyer, J., dissenting) (recognizing the specific anti-Catholic environment that gave rise to “a movement that sought to amend several state constitutions . . . to make certain that government would not help pay for ‘sectarian’ . . . schooling for children”).

While recognizing the strength of this argument,⁸⁵ as well as the anti-Catholic bias that motivated the federal Blaine Amendment,⁸⁶ this Note recognizes several difficulties of relying solely on an animus argument to constitutionally challenge State Blaines. First, the animus argument is problematic because of a lack of a clear legal framework on which to base these challenges.⁸⁷ In explaining its analysis of unconstitutional animus, the Court has laid out different factors to consider. For example, in equal protection cases, the Court has focused on “the text of an act; the full context leading up to and following enactment; the act’s real-world effects; and the degree of fit between an act’s stated purpose and its actual structure.”⁸⁸ The Court in *Lukumi* similarly provided factors relevant to determining “improper purpose” under the Religion Clauses, such as the text and structure of the law, the “effect of a law in its real operation,” the events surrounding the enactment of the law, and the legislative history of the law.⁸⁹ The Court’s flexible factor tests make them difficult to apply, and it is still unclear exactly what evidence can be used in proving the motive behind a government act.⁹⁰ Finally, in regard to equal protection challenges, there are few relevant cases to examine in forming a coherent framework for the animus doctrine.⁹¹

Another major obstacle is the large number and variety of the Blaines across the United States.⁹² While it does seem that the proposed federal Blaine Amendment was motivated by anti-Catholic animus, it becomes harder to specifically connect that bias to the passage of each State Blaine.⁹³

85 See Ira C. Lupu & Robert W. Tuttle, *Zelman’s Future: Vouchers, Sectarian Providers, and the Next Round of Constitutional Battles*, 78 NOTRE DAME L. REV. 917, 967 (2003) (“The anti-Catholic origins of at least some of the Blaine Amendments may be a powerful source of constitutional condemnation.”).

86 See generally McAfee, *supra* note 10 (describing the anti-Catholic forces at work behind the originally proposed federal Blaine Amendment in 1875).

87 See generally Pollvogt, *supra* note 75.

88 Brief of Constitutional Law Scholars, *supra* note 76, at 16 (citation omitted).

89 *Id.* at 13 (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 535 (1993)).

90 For example, in reference to the litigation surrounding the executive orders banning travel for certain populations, President Trump’s administration argued that courts should not consider unofficial statements, like campaign statements, when deciding if a government policy has a discriminatory purpose. Jim Oleske, *Animus Revisited: DOJ Fails to Explain Change in Position on Relevance of Campaign Statements*, TAKE CARE BLOG (June 6, 2017), <https://takecareblog.com/blog/animus-revisited-doj-fails-to-explain-change-in-position-on-relevance-of-campaign-statements>.

91 Pollvogt, *supra* note 75, at 900, 901 n.64 (listing *Romer v. Evans*, 517 U.S. 620 (1996); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985); *Palmore v. Sidoti*, 466 U.S. 429 (1984); and *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528 (1973)). Pollvogt examines the prevailing jurisprudence and argues for an animus framework that finds animus in two different ways—finding evidence of animus in the legislative record, or by finding it in the structure of the law itself. *Id.* at 926.

92 See DeForrest, *supra* note 18, at 576.

93 See Green, *supra* note 69, at 327–28 (arguing not only that a connection between the motivations behind the federal Blaine Amendment and State Blaines is tenuous, but

If it can be demonstrated that the particular state was motivated by anti-Catholic sentiment in passing its State Blaine, it would not necessarily be difficult to invalidate the amendment based on an animus argument,⁹⁴ but the difficulty comes in proving the subjective motivation of legislators,⁹⁵ which often is not completely clear from documentation of state constitutional conventions.⁹⁶ Susannah Pollvogt argues that animus could be proven by “pointing to direct evidence of private bias in the legislative record,”⁹⁷ but as Steven Green points out, this can be a difficult and complicated endeavor.⁹⁸

The difficulty of carrying out constitutional challenges to the State Blaines based solely on an animus argument leads scholars to look at other potential First Amendment challenges, which this Note argues could stand alone in sustaining successful challenges to State Blaines.⁹⁹

C. First Amendment Challenges

The conversation about the constitutionality of State Blaines under the U.S. Constitution revolves around components of the First Amendment: the Free Speech Clause and the Religion Clauses, which include the Free Exercise and Establishment Clauses.¹⁰⁰ The crux of the argument follows that because State Blaines are more restrictive than the U.S. Constitution in regards to restrictions on public funding of religious entities,¹⁰¹ they violate the Constitution. This Note will argue that the combination of the three clauses of the First Amendment create an “overarching” principle of nondis-

also noting that many of the state no-funding provisions were drafted before the federal Blaine Amendment debates).

94 Lupu & Tuttle, *supra* note 85, at 967 (arguing that in such a case, “federal constitutional law would likely support the invalidation of such an amendment”). *But see id.* at 969 (recognizing that if anti-Catholic motivation was the “most persuasive constitutional argument” against the State Blaines, the fight against the Blaines would be “twisted and uphill”).

95 *See* Duncan, *supra* note 11, at 551 n.243 (noting that it would be a difficult task to show specifically that “legislators passing [a State Blaine] subjectively intended to persecute Catholics”); *see also* Lupu & Tuttle, *supra* note 85, at 969 (admitting that evidence of anti-Catholic hostility may “not be easy to find,” and even if it is found, courts may not be receptive to the evidence).

96 *See* Green, *supra* note 69, at 332. Steven Green argues that he cannot find any evidence of specifically anti-Catholic animus during the debates of different state conventions for states that were required to include the no-funding provision pursuant to the Enabling Act, such as Washington in 1889. *Id.*; *see also* Douglas Laycock, *Churches, Playgrounds, Government Dollars—and Schools?*, 131 HARV. L. REV. 133, 166 (2017).

97 Pollvogt, *supra* note 75, at 926.

98 *See* Green, *supra* note 69, at 332.

99 *See, e.g.*, Duncan, *supra* note 11, at 551 n.243 (“But if we had *no* knowledge about why the State Blaines came into being, they would still operate unconstitutionally against religion.”).

100 U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . .”).

101 *See* Duncan, *supra* note 11, at 532.

crimination¹⁰² that forms the basis for the strongest challenge against the State Blaines.

School choice advocates use the general nondiscrimination argument to assert that when a state provides monetary assistance in the form of vouchers to students attending nonreligious private schools, but denies the same assistance to a student attending a religious school, the state is discriminating on the basis of religion.¹⁰³ Because the State Blaines justify this kind of discrimination, the argument follows that they violate federal rights and are unconstitutional.

This Section will describe the nondiscrimination principle in terms of three clauses of the First Amendment, while Part III will describe how *Trinity Lutheran* helps to support and expand upon this important nondiscrimination principle.

1. Using the Free Speech Clause and “Viewpoint Discrimination”

While Chief Justice Roberts in his *Trinity Lutheran* opinion,¹⁰⁴ as well as scholars writing on the subject of First Amendment challenges to State Blaines,¹⁰⁵ focused on the Religion Clauses in their arguments, some argue that the Free Speech Clause has something important to add to the nondiscrimination dialogue.¹⁰⁶ The discussion largely centers on the idea of “viewpoint discrimination,” which prohibits government restriction of the substantive content of the speech of “religious groups and believers.”¹⁰⁷

Using this principle of the Free Speech Clause, the Supreme Court in *Rosenberger v. Rector of University of Virginia*¹⁰⁸ established that states cannot discriminate based on religious viewpoint.¹⁰⁹ The case involved the University of Virginia’s use of outside contractors for the printing costs of student publications, and the University’s refusal to fund a certain student publication that promoted or manifested religious beliefs.¹¹⁰ In a majority opinion written by Justice Kennedy, the Court strongly asserted the protection of viewpoints in free speech, starting the analysis with the idea that “[i]t is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys.”¹¹¹ The Court ultimately held that the

102 *Id.* at 533. According to Duncan, the nondiscrimination principle means that “neither state nor federal governments may, consistently with the First Amendment, restrict access to generally available public benefits based on persons’ or organizations’ religious status, purpose, affiliation, or identity.” *Id.*

103 See Dick Komer et al., *Answers to Frequently Asked Questions About Blaine Amendments*, INST. FOR JUSTICE, <http://ij.org/issues/school-choice/blaine-amendments/answers-frequently-asked-questions-blaine-amendments/> (last visited Mar. 20, 2018).

104 *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017).

105 See, e.g., DeForrest, *supra* note 18; Duncan, *supra* note 11.

106 See, e.g., DeForrest, *supra* note 18, at 617–20; Wilhelmsen, *supra* note 33, at 274, 276.

107 DeForrest, *supra* note 18, at 618.

108 *Rosenberger v. Rector of Univ. of Va.*, 515 U.S. 819 (1995).

109 See Wilhelmsen, *supra* note 33, at 276 (citing *Rosenberger*, 515 U.S. at 832).

110 *Rosenberger*, 515 U.S. at 822–23.

111 *Id.* at 828 (citing *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 96 (1972)).

university could not discriminate against funding certain publications simply because the articles were written from a certain viewpoint.¹¹² This case sets the precedent for future issues of viewpoint discrimination in the context of government funding—that government can place limits on speakers in a limited public forum of its own creation—but these exclusions must be “reasonable in light of the purpose served by the forum and [must be] viewpoint neutral.”¹¹³

The idea of free speech and the prohibition of viewpoint discrimination must be balanced against Establishment Clause violations when the violation could be wound up with a sufficient state interest as to justify “content-based restrictions” against religious speech.¹¹⁴ DeForrest notes that an Establishment Clause argument could be made against an “attempt to use viewpoint discrimination doctrine to overturn” State Blaines¹¹⁵ because it is possible that the funding of a religious entity, directly or indirectly, conflicts with the idea that the state cannot affirmatively support one religion over another.¹¹⁶ This Note will continue a discussion of Establishment Clause jurisprudence and how it relates to nondiscrimination arguments and State Blaines in the next Section.

The idea of viewpoint discrimination under the Free Speech Clause—that religious speech cannot be quieted simply because of its religious character—ultimately reinforces the nonpersecution principle in current First Amendment jurisprudence. According to Kyle Duncan, “the Court’s consistent protection of religious speech” reinforces nondiscrimination in three ways: First, religious persons, groups, or speech cannot be singled out and excluded from participation in a program or forum in which it would have been permitted but for its religious character.¹¹⁷ Next, the Court’s jurisprudence reinforces that classifications that single out religion are “constitutionally suspect and per se disfavored.”¹¹⁸ Finally, the Court’s jurisprudence establishes that the Establishment Clause, as will be discussed below, does not justify religious discrimination.¹¹⁹

In light of the prohibition on viewpoint discrimination through the Free Speech Clause, some would argue that a state’s action of funding certain private entities, but failing to allow the same entities that are religious in nature access to the same funding, as the State Blaines do, would violate the nondis-

112 *Id.* at 837.

113 Duncan, *supra* note 11, at 562 (alteration in original) (quoting *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 392–93 (1993)).

114 DeForrest, *supra* note 18, at 622.

115 *Id.*

116 DeForrest ultimately argues that this Establishment Clause argument against using viewpoint discrimination to invalidate State Blaines is weak because of the Supreme Court’s holding in *Mitchell v. Helms*, which upheld a government program providing direct aid to a religious school, rejecting an Establishment Clause argument against the aid. *Id.* at 622–23 (citing *Mitchell v. Helms*, 530 U.S. 793 (2000)).

117 Duncan, *supra* note 11, at 565.

118 *Id.*

119 *Id.*

crimination principle at the heart of the viewpoint discrimination idea.¹²⁰ This Note will next examine the two other key components of the nondiscrimination principle—the Establishment and Free Exercise Clauses.

2. Nondiscrimination and the Religion Clauses

A critical look at State Blaines calls for an analysis of the Religion Clauses of the First Amendment because of the way in which many of the State Blaines “specifically target religious institutions for disparate treatment from other private organizations and individuals.”¹²¹ In general terms, the Religion Clauses of the First Amendment work together to both restrain government involvement in or endorsement of religious organizations, as well as to protect the freedom of religious organizations to openly practice their religion and not to be discriminated against in that practice. Specifically, the Establishment Clause “prohibits laws that substantively institute, authorize, or otherwise establish religion,”¹²² while the Free Exercise Clause “unambiguously forbids laws that directly target religious conduct for penalties or disabilities.”¹²³ In this way, while the Establishment Clause works as a restraint to disallow the government from giving religious entities special treatment, the Free Exercise Clause works to allow religious entities fair treatment, and to guard against mistreatment or neglect because of one’s religious belief. While this Note will not delve extensively into the detailed and complex history of Supreme Court jurisprudence of the Religion Clauses, it will explain the recent jurisprudence that shows how the Religion Clauses work in relation to government funding of religious organizations, as well as how they could be used to challenge State Blaines.

Opponents of school choice use the Establishment Clause to argue that State Blaines protect antiestablishment interests, maintaining that a strict separation of church and state is necessary to avoid any kind of partiality the government may show towards religion.¹²⁴ However, recent caselaw has confirmed that certain funding of religious organizations does not violate the principles of the Establishment Clause. The *Zelman* Court affirmed this explicitly in the context of indirect aid, stating that when a government aid program is “neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own . . . private choice, the program is not

120 See DeForrest, *supra* note 18, at 621.

121 *Id.* at 607.

122 Calabresi & Salander, *supra* note 57, at 1026.

123 Duncan, *supra* note 11, at 534.

124 See, e.g., Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act Is Unconstitutional*, 69 N.Y.U. L. REV. 437, 452–53 (1994); see also Calabresi & Salander, *supra* note 57, at 1028–29 (citing Eisgruber & Sager’s argument that the Establishment Clause requires a “hermetically strict separation of church and state”).

readily subject to challenge under the Establishment Clause.”¹²⁵ Similarly, Justice Thomas, in his concurring opinion in *Rosenberger*, stated that “[t]he Clause does not compel the exclusion of religious groups from government benefits programs that are generally available to a broad class of participants.”¹²⁶ Additional funding cases, including *Agostini v. Felton*, have rejected the principle that any kind of government aid that *directly* funds the educational function of religious schools is *per se* unconstitutional.¹²⁷ Because the Supreme Court has held that a variety of government funding of religious organizations does not violate the Establishment Clause, as Steven Calabresi and Abe Salander argue, it seems “quite difficult to claim that the Blaine Amendments serve an ‘antiestablishment’ purpose.”¹²⁸

Therefore, the caselaw suggests that the Establishment Clause itself cannot justify prohibiting all types of state funding of religious organizations, and particularly not in cases where the funding program is neutral and discriminatorily excludes religious organizations.¹²⁹ Simply put, the Establish-

125 *Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002) (first citing *Mueller v. Allen*, 463 U.S. 388 (1983); then citing *Witters v. Wash. Dep’t of Servs. for the Blind*, 474 U.S. 481 (1986); and then citing *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993)).

126 *Rosenberger v. Rector of Univ. of Va.*, 515 U.S. 819, 861 (1995) (Thomas, J., concurring).

127 Jason T. Vail, Comment, *School Vouchers and the Establishment Clause: Is the First Amendment a Barrier to Improving Education for Low-Income Children?*, 35 GONZ. L. REV. 187, 226 (1999) (quoting *Agostini v. Felton*, 521 U.S. 203, 225 (1997)). In *Agostini*, the Court reexamined its Establishment Clause analysis, which previously used the “*Lemon* test.” 521 U.S. at 219. Under *Agostini*, a statute would have the primary effect of advancing or inhibiting religion, and thus would violate the Establishment Clause, if the aid results in governmental indoctrination, if it defines its recipients by reference to religion, or if it creates excessive entanglement with religion. *Id.* at 234.

128 Calabresi & Salander, *supra* note 57, at 1043 (arguing that the Supreme Court holdings on government funding of religious organizations comport with the original meaning of the Establishment Clause which “only banned actual establishments of religion”).

129 Viteritti, *supra* note 9, at 713.

[T]he body of case law handed down by the Supreme Court suggests that the Establishment Clause was not designed to place religious organizations at a disadvantage when it comes to the allocation of public benefits, and that treating religious organizations in a different (discriminatory) fashion from other institutions raises serious questions regarding the rights protected by the Free Exercise Clause. This principle of neutrality was affirmed in *Agostini v. Felton*.

Id. Steven Calabresi and Abe Salander cite a number of cases that support this “body of case law”: *Zelman*, 536 U.S. at 662–63; *Mitchell v. Helms*, 530 U.S. 793, 801 (2000) (plurality opinion); *Rosenberger*, 514 U.S. at 845–46; *Zobrest*, 509 U.S. at 13–14; *Witters*, 474 U.S. at 489. Calabresi & Salander, *supra* note 57, at 1043 n.770; *see also* Duncan, *supra* note 11, at 530 (arguing that it is “increasingly evident” that the government can provide secular benefits to a variety of recipients, which includes religious recipients, on a neutral basis without overstepping the “bounds” of the Establishment Clause).

ment Clause itself is not a strong enough provision to justify active discrimination by states on the basis of religion.¹³⁰

While this Note argues that the Establishment Clause does not prohibit state funding of religious organizations, opponents of State Blaines take the argument further in maintaining that the Free Exercise Clause would *compel* the state to fund religious organizations in a nondiscriminatory way, thus invalidating the State Blaines because, by specifically targeting and discriminating against religious entities, they directly conflict with what the Free Exercise Clause compels.¹³¹ The Supreme Court has interpreted the Free Exercise Clause to make unconstitutional “all generic disfavoring of religious entities . . . unless the state can demonstrate that the policy is narrowly tailored to a compelling state interest.”¹³² In fact, prohibiting religious discrimination is so important to the First Amendment that it “lies at the heart of [what] the free exercise clause” protects.¹³³ This is demonstrated by the Court’s “consistent rejection” of laws that specifically impose penalties and disabilities upon religious conduct.¹³⁴

How, then, does the principle of nondiscrimination affect the discussion about State Blaines? The general purpose of State Blaines, despite their wide variety, is to separate and block government funding from religious entities.¹³⁵ If one accepts the discriminatory premise of the State Blaines, it simply follows that the neutrality principle of the Establishment Clause¹³⁶ and

130 Calabresi & Salander, *supra* note 57, at 1043 (“[W]e should not allow states to strengthen federal Establishment Clause protections in a way that discriminates on the basis of religion.”).

131 See Lupu & Tuttle, *supra* note 85, at 963 (asserting that “anti-Blaine forces” prefer to approach the problem of religious discrimination by using the Free Exercise Clause of the First Amendment).

132 *Id.* (citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993)). The Court in *Church of the Lukumi Babalu Aye* held that “[a] law burdening religious practice that is not neutral or not of general application . . . must advance ‘interests of the highest order’ and must be narrowly tailored in pursuit of those interests.” *Church of the Lukumi Babalu Aye*, 508 U.S. at 546 (quoting *McDaniel v. Paty*, 435 U.S. 618, 628 (1978)). Under *Lukumi*, a law is not neutral when its object is to “infringe upon or restrict practices because of their religious motivation.” *Duncan*, *supra* note 11, at 544 (quoting *Church of the Lukumi Babalu Aye*, 508 U.S. at 533).

133 *Duncan*, *supra* note 11, at 533. *Duncan* contrasts the nondiscrimination principle with the “non-exemption” principle, best exemplified in the *Smith* decision, which states that the Free Exercise Clause “does not require courts to grant religion-based exemptions from the burdens of genuinely neutral laws.” *Id.* (discussing *Emp’t Div. v. Smith*, 494 U.S. 872 (1990)). He emphasizes that the nonexemption rule limits the nonpersecution rule, yet “it is clear that the Free Exercise Clause unambiguously forbids laws that directly target religious conduct for penalties or disabilities.” *Id.* at 534.

134 *Id.* at 546.

135 *Id.* at 516, 566 (“[W]hat unites all State Blaines is the explicit object of separating public benefits from religious persons, institutions, and purposes.”).

136 See Frederick Mark Gedicks, *Reconstructing the Blaine Amendments*, 2 FIRST AMEND. L. REV. 85, 96–97 (2004) (arguing that religious neutrality is the predominant doctrinal rule used to measure the constitutionality of governmental distributions of funds); see also DeForrest, *supra* note 18, at 609 (“If the government opens up it [sic] coffers to provide aid

the nondiscrimination principle of the Free Exercise Clause¹³⁷ render the amendments, which clearly “place religion at a civil disadvantage with respect to all conduct, institutions, and persons that are ‘non-religious,’”¹³⁸ as violative of the First Amendment. In the context of school choice programs, this would imply that if a state funds neutral school choice programs, but bars religious schools from participating under the state’s State Blaine provision, it would violate this principle of nondiscrimination.¹³⁹ Although some laws can constitutionally burden religious practice if both neutral and generally applicable, the State Blaines “exclude themselves” from this category because of their direct targeting of religious institutions that would otherwise be eligible for the benefits.¹⁴⁰

The recent *Trinity Lutheran* opinion, which this Note will analyze next, builds upon this Free Exercise and nondiscrimination jurisprudence, forecasting where the modern Court could lead school choice advocates in challenging State Blaines.

III. TRINITY LUTHERAN AND FREE EXERCISE

A. Background

The story of *Trinity Lutheran Church of Columbia, Inc. v. Comer* began in Columbia, Missouri, in 2012, when Trinity Lutheran Church Child Learning Center (“Trinity Lutheran”), a preschool and daycare owned and operated by Trinity Lutheran Church, applied for a state grant in order to obtain funding for a new rubber surface for its playground.¹⁴¹ The grant is part of Missouri’s Scrap Tire Program, which is administered by Missouri’s Department of Natural Resources (“the Department”).¹⁴² The grant is given annually to “qualifying nonprofit organizations that purchase playground surfaces made from recycled tires.”¹⁴³ The Department granted fourteen grants in the 2012 Scrap Tire Program.¹⁴⁴ Although Trinity Lutheran originally ranked fifth among the forty-four applicants in the program,¹⁴⁵ the Department rejected Trinity Lutheran’s application because it was ineligible to receive a grant

to secular private schools or their students, the principle of religious neutrality requires that they should also allow religionists and religious schools to participate in such aid programs.”).

137 DeForrest, *supra* note 18, at 626 (“While no state is required to provide grants or aid for students attending private schools, if a state does decide to provide such aid, it simply cannot discriminate against religious believers and institutions and still comply with the requirements of the First Amendment.”).

138 Duncan, *supra* note 11, at 550.

139 See DeForrest, *supra* note 18, at 609.

140 Duncan, *supra* note 11, at 550.

141 *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2017 (2017).

142 *Id.*

143 *Id.*

144 *Id.* at 2018.

145 *Id.* The Department awards grants to applicants who score highest on several objective criteria, including the poverty level in the applicant’s area and the applicant’s recycling

under Article I, § 7 of the Missouri Constitution.¹⁴⁶ The provision, which incorporates classic Blaine Amendment language limiting government funds for religious organizations, reads:

That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship.¹⁴⁷

Pursuant to this constitutional provision, the Department denied Trinity Lutheran's application solely because of its status as a religious organization.¹⁴⁸ Trinity Lutheran brought suit against the Department, alleging that the denial based on the provision of the Missouri Constitution constituted a violation of the First Amendment's Free Exercise Clause. The district court granted the Department's motion to dismiss on the grounds that, under *Locke v. Davey*, the Free Exercise Clause "generally does not prohibit withholding an affirmative benefit on account of religion."¹⁴⁹ Accordingly, the Eighth Circuit Court of Appeals affirmed the district court's ruling, and the Supreme Court granted certiorari.¹⁵⁰

B. The Opinion

Chief Justice John Roberts wrote the majority opinion for the Court, and reversed the lower court by holding that the Department violated the Free Exercise Clause by denying Trinity Lutheran's application.¹⁵¹ After explaining that the parties agreed that the Establishment Clause did not prevent Missouri from awarding this grant to a religious organization,¹⁵² the Court

plan. *Id.* at 2017. Trinity Lutheran scored high enough to be awarded a grant, but for its religious status. *Id.* at 2018.

146 *Id.*

147 *Id.* at 2017 (quoting MO. CONST. art. I, § 7).

148 "[T]he Department had a strict and express policy of denying grants to any applicant owned or controlled by a church, sect, or other religious entity," which was "compelled by Article I, Section 7 of the Missouri Constitution." *Id.* Although the Governor later rejected this policy, the announcement did not moot Trinity Lutheran's case. *See id.* at 2019 n.1.

149 *Id.* at 2018.

150 For a short description of the political environment in which certiorari was granted and the case was heard at the Supreme Court, including the death of Justice Scalia, election of Donald Trump, and confirmation of Justice Gorsuch, see Garnett & Blais, *supra* note 71, at 111–12.

151 *Trinity Lutheran*, 137 S. Ct. at 2019.

152 Richard Garnett and Jackson Blais note that the parties' agreement on the Establishment Clause issue is important, as it "suggests that the evolution . . . in the Court's approach to cases involving public support for, and cooperation with, religious institutions is fairly settled." Garnett & Blais, *supra* note 71, at 113. However, Justice Sotomayor radically disagreed on this issue in her dissent, as she argued that the Establishment Clause would expressly prohibit this type of funding. *See Trinity Lutheran*, 137 S. Ct. at 2028 (Sotomayor, J., dissenting) ("The Establishment Clause does not allow Missouri to grant

explained that the Free Exercise Clause “‘protect[s] religious observers against unequal treatment’ and subjects to the strictest scrutiny laws that target the religious for ‘special disabilities’ based on their ‘religious status.’”¹⁵³ The Court discussed a line of cases¹⁵⁴ that explains the Court’s precedent of “repeatedly” confirming “that denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion that can be justified only by a state interest ‘of the highest order.’”¹⁵⁵

The Court went on to explain that the Department’s policy, enacted pursuant to Missouri’s constitutional provision, “expressly discriminates” against applicants who would be otherwise eligible, solely because of their religious status.¹⁵⁶ Because of its religious status, Trinity Lutheran was actively discriminated against, encroaching upon its free exercise of religion. In applying for the grant, the church was simply “assert[ing] a right to participate in a government benefit program without having to disavow its religious character.”¹⁵⁷ In affirming Trinity Lutheran’s right to participate in a secular, neutral program, the Court affirmed important principles of nondiscrimination, extending the principle not only to cases where religious organizations are prohibited from engaging in religious conduct, but also to cases where they are “indirect[ly] coerc[ed]” or penalized because of their exercise of religion.¹⁵⁸

The Court clearly distinguished this case from *Locke v. Davey*,¹⁵⁹ explaining that *Davey* involved a denial of a government benefit because of what the plaintiff would do with the funds—“prepare for the ministry.”¹⁶⁰ *Trinity Lutheran*, however, involved a denial of government funds because of what it is—a religious organization.¹⁶¹ The Court also noted that the training of clergy clearly implicates a state’s antiestablishment interests, as a state should not be made to pay for the training of clergy, while the same cannot be said of a program to resurface playgrounds.¹⁶² While in *Davey*, students could continue to retain their religious beliefs and receive the scholarship by using

the Church’s funding request because the Church uses the Learning Center, including its playground, in conjunction with its religious mission.”).

153 *Trinity Lutheran*, 137 S. Ct. at 2019 (alteration in original) (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533, 542 (1993)).

154 *See id.* at 2019–21 (first discussing *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947); then discussing *McDaniel v. Paty*, 435 U.S. 618 (1978) (plurality opinion); then discussing *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439 (1988); then discussing *Emp’t Div. v. Smith*, 494 U.S. 872 (1990); and then discussing *Church of the Lukumi Babalu Aye*, 508 U.S. 520).

155 *Id.* at 2019 (quoting *McDaniel*, 435 U.S. at 628).

156 *Id.* at 2021–22 (“[T]he Department’s policy puts Trinity Lutheran to a choice: It may participate in an otherwise available benefit program or remain a religious institution.”).

157 *Id.* at 2022.

158 *Id.* (quoting *Lyng*, 483 U.S. at 450).

159 540 U.S. 712 (2004). For a discussion of *Davey*, see *supra* Part II.

160 *Trinity Lutheran*, 137 S. Ct. at 2023.

161 *Id.*

162 *See id.*

their scholarships to take religious courses at religious schools, Trinity Lutheran could not continue to espouse its religious beliefs and practices and receive this government funding.¹⁶³

Finally, the Court ruled that the Department did not express a strong enough state interest to justify this kind of penalty on religious practice.¹⁶⁴ The Department only asserted as a justification its policy preference to “skat[e] as far as possible from religious establishment concerns.”¹⁶⁵ The Court simply stated that this specified interest “cannot qualify as compelling,” because it is “already ensured under the Establishment Clause.”¹⁶⁶ Because the Establishment Clause protections are limited by the Free Exercise Clause, Missouri could not avoid an entanglement of church and state “to the point of expressly denying a qualified religious entity a public benefit solely because of its religious character.”¹⁶⁷

The majority opinion was joined by seven of the Justices, with Justices Thomas, Gorsuch, and Breyer separately concurring, and Justices Sotomayor and Ginsburg dissenting. Justices Thomas and Gorsuch joined the majority, but specifically did not join footnote three of the opinion.¹⁶⁸ Footnote three limits the Court’s holding to cases involving “express discrimination based on religious identity with respect to playground resurfacing.”¹⁶⁹ Justice Gorsuch explained in his concurrence that he doubts the “stability” of this distinction between religious use and status, and worries that the footnote will unnecessarily constrain the Court’s holding to an arbitrary set of cases, like those involving “playground resurfacing” or those “with some association with children’s safety or health.”¹⁷⁰ Justice Gorsuch spoke about the “general principles” of nondiscrimination, which suggests that he favors a broader protection for the free exercise of religion, including both the status of a religious entity and its practice of religion.¹⁷¹ Justice Breyer concurred only in the Court’s judgment, emphasizing the nature of the “public benefit” in Trinity Lutheran’s case.¹⁷² Because the program at issue was a “general program designed to secure or to improve the health and safety of children,” it fit into the category of general governmental services, and according to the

163 *Id.* *But see* Laycock, *supra* note 96, at 159–60 (refuting this reasoning by the Court, explaining that it is not an accurate description of the facts in *Davey* and emphasizing the more basic distinction between *Davey* and *Trinity Lutheran*: that “only *Davey* involved a religious use of the state’s money”). It is worth noting that Justice Thomas, in his concurrence, disagreed with the Court’s original reasoning and holding in *Davey*, and did not join the Court’s “endorsement” of *Davey* in this opinion. *Trinity Lutheran*, 137 S. Ct. at 2025 (Thomas, J., concurring in part).

164 *Trinity Lutheran*, 137 S. Ct. at 2024.

165 *Id.*

166 *Id.* (quoting *Widmar v. Vincent*, 454 U.S. 263, 276 (1981)).

167 *Id.*

168 *Id.* at 2025 (Thomas, J., concurring in part).

169 *Id.* at 2024 n.3 (plurality opinion).

170 *Id.* at 2025–26 (Gorsuch, J., concurring in part).

171 *Id.* at 2026.

172 *Id.* (Breyer, J., concurring in the judgment).

Court in *Everson*, it “is obviously not the purpose of the First Amendment” to cut off funding for these services.¹⁷³ While Justice Breyer agreed that playground resurfacing fit into this category, he refused to apply the holding to any other kinds of public benefits, which “come in many shapes and sizes.”¹⁷⁴

Lastly, Justice Sotomayor, joined by Justice Ginsburg, dissented from the Court’s holding. Justice Sotomayor’s double dissent¹⁷⁵ rejected both the claim that the Establishment Clause would not prevent funding from going to Trinity Lutheran, and the holding that the Free Exercise Clause compels that funding go to Trinity Lutheran.¹⁷⁶ She argued that the funding at issue would “further religious activity,” however remotely, which is prohibited by the Establishment Clause.¹⁷⁷ Furthermore, she claimed that a state is not required to fund religious entities, and can “single[] out religious entities for exclusion from its reach,” depending on the reasons it does so.¹⁷⁸ As Douglas Laycock discusses, Justice Sotomayor appealed to the history of the United States.¹⁷⁹ She discussed a “state-by-state review” of the church funding debate, and ultimately argued that the unconstitutionality of “religious assessments,” meaning “special funding for the religious functions of churches,” is central to this country’s founding.¹⁸⁰ Justice Sotomayor relied heavily on *Davey* in upholding a “separationist commitment,”¹⁸¹ and warned that the majority opinion will lead us to “a place where separation of church and state is a constitutional slogan, not a constitutional commitment.”¹⁸²

C. Trinity Lutheran *and the State Blaines*

Although *Trinity Lutheran* was highly publicized as a case about the State Blaines, the Court makes no mention of the Blaine Amendment controversy.¹⁸³ The Missouri constitutional provision at issue in the case is not

173 *Id.* at 2027 (quoting *Everson v. Bd. of Educ.*, 330 U.S. 1, 17–18 (1947)).

174 *Id.*

175 Garnett & Blais, *supra* note 71, at 118 (“In a sense, Justice Sotomayor dissented twice.”).

176 *Trinity Lutheran*, 137 S. Ct. at 2027–41 (Sotomayor, J., dissenting).

177 *Id.* at 2030.

178 *Id.* at 2032; *see also* Garnett & Blais, *supra* note 71, at 120.

179 *See* Laycock, *supra* note 96, at 142–43; *see, e.g., Trinity Lutheran*, 137 S. Ct. at 2032–35 (Sotomayor, J., dissenting).

180 Laycock, *supra* note 96, at 143. Laycock argues that the dissent was incorrect because “no one is proposing that kind of funding today.” *Id.* Instead, the issue revolves around “religiously neutral funding” of “broader categor[ies] of private activity,” and so the funded activity is mostly secular. *Id.*

181 Garnett & Blais, *supra* note 71, at 120.

182 *Trinity Lutheran*, 137 S. Ct. at 2041 (Sotomayor, J., dissenting).

183 Garnett & Blais, *supra* note 71, at 125 (“The commentary leading up to *Trinity Lutheran* regularly emphasized the Blaine Amendments’ history, context, and purposes and treated the case as, at least in part, a case ‘about’ them.”); *see also* Philip Hamburger, *Prejudice and the Blaine Amendments*, FIRST THINGS (June 20, 2017), <https://www.firstthings.com/web-exclusives/2017/06/prejudice-and-the-blaine-amendments> (discussing State Blaine Amendments in conjunction with *Trinity Lutheran*).

clearly a State Blaine, although it uses the same language that prohibits funding for religious organizations, which is the purpose of the Blaines.¹⁸⁴ However, Justice Sotomayor put Missouri's Article I, § 7 in the same category of these state "no aid" provisions, citing thirty-eight states that have adopted State Blaines.¹⁸⁵ Apart from her mention that State Blaines exist, and that states have promoted a stricter separation of church and state through these provisions,¹⁸⁶ State Blaines are absent from all of the opinions.¹⁸⁷

It is unclear why the Court refused to mention the States Blaines at all, but the Court's holding was a ruling on a state's impermissible interpretation of a no funding provision—here, Article I, § 7 of the Missouri Constitution. The opinion, therefore, could have serious consequences for future challenges against policies based on State Blaines. A decision that refuses to tolerate the use of a State Blaine to exclude a religious entity from a neutral funding program signifies a confirmation of nondiscrimination principles and a Court that could go to greater lengths to protect religious practice from the strict separation policies furthered by State Blaines.¹⁸⁸

IV. THE FUTURE OF STATE BLAINE AMENDMENTS

Since the Court's ruling in *Trinity Lutheran*, commentators have spoken about it in relationship to State Blaines, as well as its potential effects on the State Blaines' constitutionality.¹⁸⁹ The Court's holding that a policy based

184 Missouri has a specific State Blaine in its education article, added in 1870, but "Missouri did not rely on this provision in *Trinity Lutheran*, presumably because it is too obviously a Blaine amendment." Laycock, *supra* note 96, at 167. However, Laycock argues that the "timing and language" of Missouri's Article I, § 7 "suggests that it was part and parcel of the movement for Blaine provisions . . ." *Id.* at 168.

185 *Trinity Lutheran*, 137 S. Ct. at 2037, 2037 n.10 (Sotomayor, J., dissenting).

186 *Id.* at 2037–38.

187 Several organizations submitting amicus briefs made the argument that Missouri's constitutional provision is unconstitutional because of its antireligious motives, yet the Court still refused to acknowledge the issue in its opinion. See Garnett & Blais, *supra* note 71, at 126 n.100. Garnett and Blais posit that this refusal could signify the Court avoiding the line of argument that the amendments are unconstitutional because of their antireligious motivations. *Id.* at 126 ("[The rejection of animus arguments] could indicate reservations by some justices regarding judicial doctrines and tests that require close scrutiny and criticism of official actors' motives and aims.").

188 See Kimberly Winston, *What is the Blaine Amendment and Did SCOTUS Kill It?*, RELIGION NEWS SERVS. (June 28, 2017), <http://religionnews.com/2017/06/28/the-splainer-what-is-the-blaine-amendment-and-did-scotus-kill-it/>.

189 See, e.g., *id.*; John L. Allen, Jr. & Ines San Martin, *Lori: After Trinity Lutheran, 'All Anti-Catholic 'Blaine Amendments' Should Fall*, CRUX (July 6, 2017), <https://cruxnow.com/interviews/2017/07/06/lori-trinity-lutheran-anti-catholic-blaine-amendments-fall/>; Sarah Pulliam Bailey, *The Supreme Court Sided with Trinity Lutheran Church. Here's Why That Matters.*, WASH. POST (June 26, 2017), https://www.washingtonpost.com/news/acts-of-faith/wp/2017/06/26/the-supreme-court-sided-with-trinity-lutheran-church-heres-why-that-matters/?utm_term=.d9d90c86c3bb; Eric Fehrstrom, *Ruling Against Blaine Amendments Is a Victory for Liberty*, BOS. GLOBE (July 6, 2017), <https://www.bostonglobe.com/opinion/2017/07/06/ruling-against-blaine-amendments-victory-for-liberty/z78hXrdNzyis3GkasfV72J/story>

on a State Blaine’s antifunding principles violates the Free Exercise Clause directly challenges the “discriminatory operation”¹⁹⁰ of the State Blaines. The question now is: Will the Court continue to strike down no-funding policies based on State Blaines, seriously affecting debates on school choice and other state-funded programs? In part, this question depends on how broadly the Court is willing to interpret its holding in *Trinity Lutheran*.

As discussed in Section III.B, the Court included a footnote that explicitly limits the Court’s holding to “express discrimination based on religious identity with respect to playground resurfacing.”¹⁹¹ The footnote, while not joined by a majority of the Court,¹⁹² signals the Court’s potential hesitation to speak too broadly or definitively on the subject of religious funding. The footnote implies that the Court’s reasoning only applies to secular uses of funding, like playground resurfacing. Additionally, Justice Sotomayor’s “bracing” and “unyielding”¹⁹³ dissent demonstrates that at least two members of the Court favor a strong resistance to broadening Free Exercise principles and strengthening Establishment Clause protections for church and state separation. Justice Sotomayor’s long citation of State Blaines to support her argument might show an acceptance of these types of constitutional “no aid” provisions.

In spite of these signs of resistance and hesitation to making broad declarations about government funding to religious entities in other contexts, Justice Gorsuch’s concurrence does show a more open attitude toward broadening protections for religious entities. He rejected a strict line between funding based on religious *status* or *use* implicated in footnote three, saying that “[i]t is free exercise either way.”¹⁹⁴ If the “use” of the government funding at issue does not need to be secular, this could greatly broaden Free Exercise protections. Justice Gorsuch emphasized the “general principles” set out in the case, which “do not permit discrimination against religious exercise—whether on the playground or anywhere else.”¹⁹⁵ His acceptance of “generally applicable, nondiscrimination principles”¹⁹⁶ indicates that the Court has the potential to continue to affirm these principles in more significant ways. If Justice Gorsuch is willing to strike down religious discrimination of any form, “whether on the playground or anywhere else,” it is possible that

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190 Duncan, *supra* note 11, at 499.

191 *Trinity Lutheran*, 137 S. Ct. at 2024 n.3. (plurality opinion).

192 See Garnett & Blais, *supra* note 71, at 124.

193 *Id.* at 118.

194 *Trinity Lutheran*, 137 S. Ct. at 2026 (Gorsuch, J., concurring in part).

195 *Id.*

196 Garnett & Blais, *supra* note 71, at 124.

he would be willing to strike down State Blaines that expressly take away religious entities' right to participate in neutral government funding programs, potentially regardless of whether the funding would be used in strictly secular ways. This general principle of nondiscrimination permeates the Court's opinion, strengthening a potential Free Exercise challenge against the State Blaines.¹⁹⁷ The Court has already remanded several cases that could shed light on the Blaines' future sooner rather than later.¹⁹⁸

A final consequence of the *Trinity Lutheran* opinion is that it could shift the focus of State Blaine challenges away from the "animus" or "motive" arguments¹⁹⁹ and toward challenges that are more focused on express discrimination, as developed in *Trinity Lutheran*. As Douglas Laycock explains, "[i]f a state's Blaine provision results in facial discrimination" against religious entities, "then motive should not matter after *Trinity Lutheran*."²⁰⁰ The Court in *Trinity Lutheran* indicated that "express discrimination" should be enough to sustain a challenge, regardless of the motive behind the law.²⁰¹ Because of the inherent difficulties in sustaining a challenge based on motive, the *Trinity Lutheran* opinion pushes future challenges to rely on these broad principles of nondiscrimination under the Free Exercise Clause.

CONCLUSION

The Court's holding in *Trinity Lutheran* directly targets laws which require individuals to "choose between their religious beliefs and receiving a government benefit."²⁰² State Blaines are often used in this way to fulfill their original purpose—to broadly block government funding from reaching any type of religious organization—and so lead us to question their constitutionality under First Amendment principles of nondiscrimination. Because *Trinity Lutheran's* holding applies to laws regarding "express discrimination and secular uses of funding," it clearly implicates State Blaines that expressly

197 This potential challenge to the State Blaines—prohibiting any religious discrimination in neutral government funding programs—has particular significance for the school choice proponents. See Laycock, *supra* note 96, at 169 ("The logic of nondiscrimination should extend these principles to funding secular functions that are to some extent combined with religious functions, as in church-affiliated schools.").

198 After ruling on *Trinity Lutheran*, the Court remanded two separate challenges to state no-aid provisions in the context of school choice, which will be important in terms of how the lower courts interpret the Court's reasoning, and for the general future of State Blaine challenges after *Trinity Lutheran*. See Garnett & Blais, *supra* note 71, at 124–25; Laycock, *supra* note 96, at 160–61.

199 See *supra* Section II.B.

200 Laycock, *supra* note 96, at 166–67; see also Fehrstrom, *supra* note 189 ("The fact that the Blaine amendments are firmly implanted in anti-Catholic prejudice is no longer the main issue with their continued existence. The far more serious problem is that they are unconstitutional because . . . they force churches to choose between their religious character or participation in a public program.").

201 Laycock, *supra* note 96, at 167.

202 *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2023 (2017) (quoting *Locke v. Davey*, 540 U.S. 712, 720–21 (2004)).

exclude religious organizations from funding that is available to any other organization based on neutral criteria.²⁰³

This Note argues that if a State Blaine goes beyond the bounds of what the Constitution permits and compels in terms of the free exercise of religion, it has the potential to be struck down as unconstitutional. Furthermore, this Note argues that opponents of State Blaines have an even stronger Free Exercise argument against the provisions after the holding in *Trinity Lutheran*. Chief Justice Roberts's majority opinion signals an affirmation of nondiscrimination principles, while Justice Gorsuch's concurrence signals a willingness to take the more general principles of nondiscrimination and to apply them in future Free Exercise cases, no matter what the subject matter of the case. While Justice Sotomayor strongly disagreed and advocated a much stricter Establishment Clause jurisprudence, as well as a much less permissive Free Exercise jurisprudence, her dissent affirms the idea that the Court's reasoning has the potential to "profoundly change[]" the relationship between church and state in this country.²⁰⁴

The Free Speech Clause, the Establishment Clause, and the Free Exercise Clause of the First Amendment, as examined in this Note, together reinforce nondiscrimination principles that work against the states' interpretations of State Blaines that discriminatorily burden the free exercise of religion. The First Amendment decisions leading up to, and including, *Trinity Lutheran* have led the Court to a point where State Blaines could be successfully challenged in federal court, knocking down a roadblock for religious freedom and school choice advocates. For opponents of State Blaines, *Trinity Lutheran* means a step away from animus arguments, and a push towards arguments based on discrimination found on the face of the law or policy itself.

Federal courts may soon decide the fate of several State Blaines as applied to school choice.²⁰⁵ Following the argument put forth in this Note, future courts hearing challenges to State Blaines should be receptive to broader protections for religious freedom made available under *Trinity Lutheran*—protections that will allow a religious entity to freely practice its religion while being accepted as a full, participating member in the community.

203 Laycock, *supra* note 96, at 169.

204 *Trinity Lutheran*, 137 S. Ct. at 2027 (Sotomayor, J., dissenting).

205 See *Taxpayers for Pub. Educ. v. Douglas Cty. Sch. Dist.*, 351 P.3d 461 (Colo. 2015); *Moses v. Skandera*, 367 P.3d 838 (N.M. 2015).